

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

D O N A L D            F .  
CHIARIELLO,

Plaintiff,

v.

No. C 04-1076 CW

ORDER GRANTING  
PLAINTIFF LEAVE TO  
FILE SECOND AMENDED  
COMPLAINT

ING GROEP NV, a  
Netherlands  
corporation,

Defendant.

Plaintiff Donald F. Chiarello moves for leave to file a second amended complaint (SAC), in order (1) to withdraw his identification of his claim as within maritime and admiralty jurisdiction and (2) to add allegations of bad faith conduct so as to permit recovery of attorneys' fees. Defendant ING GROEP NV opposes the motion.

The matter was heard on July 15, 2005. Having considered all of the papers filed by the parties and oral argument on the motion, the Court grants Plaintiff's motion.

BACKGROUND

This case involves a dispute over denial of coverage under a marine insurance policy. Plaintiff is a resident of Colorado. First Amended Complaint (FAC) ¶ 3. Defendant is a Netherlands corporation with its principal place of business in Amsterdam.

1 Id.

2       Defendant issued Plaintiff an insurance policy to cover his  
3 wooden sailing schooner, the ATTU. The policy application  
4 provided that its terms would be governed by Florida law. FAC,  
5 Ex. A, Insurance Application at 2. The insurance policy  
6 agreement provided that dispute would be adjudicated according to  
7 substantive federal admiralty laws, or New York law if no federal  
8 admiralty precedent exists. FAC, Ex. B, Insurance Agreement at  
9 12. Both the application and agreement list Plaintiff's  
10 residence as Annapolis, Maryland.

11       The ATTU later sank off the South China Sea and was declared  
12 a total loss. Defendant denied Plaintiff's claim for benefits,  
13 on the grounds that he had breached a condition in the  
14 application for the policy prohibiting single-handed operation of  
15 the vessel.

16       Plaintiff originally filed his complaint in propria persona  
17 on March 17, 2004, alleging one cause of action for recovery of  
18 sums due under the maritime insurance policy. In the second  
19 paragraph of the complaint, Plaintiff alleged that jurisdiction  
20 existed based on diversity and also under Federal Rule of Civil  
21 Procedure 9(h), which provides that claims "within the  
22 jurisdiction of the district court on some other ground may  
23 contain a statement identifying the claim as an admiralty or  
24 maritime claim." Defendant answered and brought counterclaims  
25 seeking a declaratory judgment voiding the policy. At the same  
26 time, Defendant agreed to the dismissal of an action it had  
27 brought against Plaintiff for declaratory judgment in the

1 District of Maryland. Gendell Decl., Ex. 4, April 12, 2004  
2 Stipulation of Dismissal.

3 On July 22, 2004, Plaintiff, still in pro per, moved to  
4 amend his complaint to allege three additional State law causes  
5 of action, including breach of contract, breach of the implied  
6 covenant of good faith and fair dealing, and unfair and deceptive  
7 trade practices. Plaintiff demanded a jury trial for the  
8 additional claims only. Defendant opposed the motion to amend.  
9 The Court permitted Plaintiff to file a FAC, but struck the  
10 proposed second count for breach of contract as redundant.  
11 September 17, 2004 Order Granting Motion for Leave to Amend  
12 Complaint and Striking Count Two.

13 Defendant then moved to dismiss the FAC's claims for breach  
14 of the implied covenant and unfair and deceptive trade practices.  
15 Plaintiff, who had by then obtained representation, did not  
16 oppose the motion with respect to his unfair trade practices  
17 claim, and the Court dismissed that claim with prejudice.  
18 Plaintiff did oppose dismissal of his claim for breach of the  
19 implied covenant; the Court dismissed it without prejudice.  
20 December 3, 2004 Minute Order. The Court later approved a  
21 stipulation by the parties clarifying that the Court's order  
22 meant that if Florida law were found to apply and Plaintiff were  
23 to prevail on his breach of contract claim, he would be permitted  
24 to file a separate lawsuit asserting a statutory claim of bad  
25 faith. February 7, 2005 Stipulation. The Court has since  
26 ordered that the choice of law issues will not be addressed until  
27 the summary judgment motion briefing. June 2, 2005 Scheduling  
28

## 1 Order.

2 Plaintiff now seeks to file a SAC. The proposed SAC brings  
3 only the surviving claim for breach of contract. However,  
4 Plaintiff seeks to withdraw his prior Rule 9(h) statement  
5 identifying this claim as within admiralty or maritime  
6 jurisdiction, leaving only diversity as a basis for jurisdiction,  
7 and to demand a jury trial on his claim. Plaintiff also seeks to  
8 add additional allegations of bad faith in order to support a  
9 claim for attorneys' fees.

## LEGAL STANDARD

11       Federal Rule of Civil Procedure 15(a) provides that leave to  
12 amend a pleading "shall be freely given when justice so  
13 requires." Leave to amend lies within the sound discretion of  
14 the trial court, which discretion "must be guided by the  
15 underlying purpose of Rule 15 to facilitate decision on the  
16 merits, rather than on the pleadings or technicalities." United  
17 States v. Webb, 655 F.2d 977, 979 (9th Cir. 1981) (citations  
18 omitted). Thus, Rule 15's policy of favoring amendments to  
19 pleadings should be applied with "extreme liberality." Id.; DCD  
20 Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987)  
21 (citations omitted).

22 The Supreme Court has identified four factors relevant to  
23 whether a motion for leave to amend should be denied: undue  
24 delay, bad faith or dilatory motive, futility of amendment, and  
25 prejudice to the opposing party. Foman v. Davis, 371 U.S. 178,  
26 182 (1962). The Ninth Circuit holds that these factors are not  
27 of equal weight; specifically, delay alone is insufficient ground

1 for denying leave to amend. Webb, 655 F.2d at 980. Further, the  
2 "liberality in granting leave to amend is not dependent on  
3 whether the amendment will add causes of action or parties." DCD  
4 Programs, 833 F.2d at 186. Rather, the court should consider  
5 whether the proposed amendment would cause the opposing party  
6 undue prejudice, is sought in bad faith, or constitutes an  
7 exercise in futility. Id. (citing Acri v. Int'l Ass'n of  
8 Machinists & Aerospace Workers, 781 F.2d 1393, 1398-99 (9th Cir.  
9 1986); United States v. City of Twin Falls, 806 F.2d 862, 876  
10 (9th Cir. 1986); Howey v. United States, 481 F.2d 1187, 1190-91  
11 (9th Cir. 1973); Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv.  
12 Bureau, 701 F.2d 1276, 1293 (9th Cir. 1983)).

13 Prejudice typically arises where the opposing party is  
14 surprised with new allegations which require more discovery or  
15 will otherwise delay resolution of the case. See, e.g., Acri,  
16 781 F.2d at 1398-99; Guthrie v. J.C. Penney Co., 803 F.2d 202,  
17 210 (5th Cir. 1986). The party opposing the motion bears the  
18 burden of showing prejudice. DCD Programs, 833 F.2d at 186;  
19 Beeck v. Aquaslide 'N' Dive Corp., 562 F.2d 537, 540 (8th Cir.  
20 1977).

21 DISCUSSION

22 Defendant opposes the motion to file a SAC on grounds of  
23 futility and prejudice, specifically that (1) under any  
24 potentially applicable law, Plaintiff cannot maintain a claim for  
25 bad faith and (2) Plaintiff's proposed demand for a jury trial is  
26 ineffective and prejudicial. These issues are addressed in turn.

1       Defendant's first objection rests on its misapprehension  
2 that Plaintiff seeks to add a new cause of action for "bad  
3 faith." Instead, the proposed SAC brings only the single,  
4 surviving breach of contract claim; Plaintiff intends the  
5 allegations regarding bad faith to support a request for  
6 attorneys' fees. Plaintiff does not request punitive damages.  
7 The availability of attorneys' fees may depend on the applicable  
8 law, but that issue will not be decided until summary judgment,  
9 at the earliest. Therefore, Defendant has not shown that  
10 Plaintiff's proposed amendments are futile.

11       Second, Defendant argues that by originally electing the  
12 Court's admiralty jurisdiction under Rule 9(h), Plaintiff has  
13 waived his right to a jury trial.

14       Defendant's argument runs counter to the express language of  
15 Rule 9(h). Rule 9(h) contemplates that pleadings electing to  
16 identify a claim within admiralty and maritime jurisdiction may  
17 be later amended to withdraw such an identifying statement, and  
18 specifies that such a proposed amendment "is governed by the  
19 principles of Rule 15."

20       Defendant argues that withdrawal of Plaintiff's Rule 9(h)  
21 election would necessarily result in the forfeiture of any right  
22 to a jury trial on the newly-designated State law claim.  
23 However, the two cases cited by Defendant are entirely  
24 inapposite. In Pacific Tall Ships v. Kuehne & Nagel, Inc., 2000  
25 WL 283918, 2000 A.M.C. 1152 (N.D. Ill. 2000), the plaintiff  
26 clearly intended to bring its claims in admiralty, and then  
27 demanded a jury trial without revoking its Rule 9(h) election.

1 Similarly, the issue in Foulk v. Donjon Marine Co., Inc., 144  
2 F.3d 252, 255-257 (3rd Cir. 1998), was whether the plaintiff had  
3 sufficiently alleged admiralty jurisdiction so as to grant the  
4 appellate court jurisdiction to hear an interlocutory appeal; the  
5 court expressly did not consider the implications of its order on  
6 the plaintiff's demand for a jury trial. Id. at n.7. Here, in  
7 contrast, Plaintiff intends to revoke his election of admiralty  
8 jurisdiction without taking any advantage of admiralty  
9 procedures. The cases upon which Pacific Tall Ships and Foulk  
10 rely likewise do not support Defendant's argument.

11 Defendant suggests that it faces undue prejudice if  
12 Plaintiff is allowed to withdraw his Rule 9(h) identification  
13 because Defendant relied upon Plaintiff's admiralty election when  
14 it made its decisions not to contest jurisdiction and venue in  
15 California and to dismiss its first-filed Maryland declaratory  
16 judgment action. Otherwise, Defendant contends, it would have  
17 successfully moved to dismiss or transfer based on Plaintiff's  
18 lack of connection with this forum. Instead, Defendant relied on  
19 its successful motion to dismiss the State law claims against it.  
20

21 Defendant has shown no justifiable basis for its assumption  
22 that Plaintiff would not withdraw his Rule 9(h) identification.  
23 Plaintiff's original complaint clearly set forth a claim for  
24 relief alleging both admiralty and diversity jurisdiction.  
25 Defendant has not shown that Plaintiff has subsequently availed  
26 himself of the advantages of his admiralty and maritime election,  
27 e.g., taking an interlocutory appeal available only to claims in  
28

1 admiralty. See Ghotra v. Bandila Shipping, Inc., 113 F.3d 1050,  
2 1058 (9th Cir. 1997) (holding plaintiffs entitled to jury trial  
3 on both common law and in rem admiralty claims where plaintiffs  
4 did not introduce a new jurisdictional basis in the midst of  
5 litigation or utilize the advantages of admiralty procedures).  
6 Therefore, the Court will allow Plaintiff to file the proposed  
7 SAC. The Court will give Defendant the opportunity to cure any  
8 prejudice, however, by entertaining an otherwise untimely motion  
9 to transfer the case based on Plaintiff's lack of connection to  
10 this forum.

11 CONCLUSION

12 For the foregoing reasons, the Court GRANTS Plaintiff's  
13 motion for leave to amend his complaint (Docket No. 69).  
14 Plaintiff may file the proposed SAC within one week of the date  
15 of this order. Defendant may file a motion to transfer the  
16 action within two weeks after the filing of the SAC.

17  
18 IT IS SO ORDERED.  
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21  
22 Dated: 7/21/05

23 /s/ CLAUDIA WILKEN  
24 CLAUDIA WILKEN  
United States District  
Judge  
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